CHEW KAM MENG

v.

KERAJAAN MALAYSIA

HIGH COURT MALAYA, PENANG
RK NATHAN J
[ORIGINATING SUMMONS NO: 25-15-2001]
19 JUNE 2002

REVENUE LAW: *Real property gains tax - Appeal against assessment - Appeal withdrawn by applicant - Effect of withdrawal - Order under ss. 102(5) & (8) Income Tax Act made by Special Commissioners - Whether appeal could be reinstated - Whether Special Commissioners functus officio - Whether assessed tax became conclusive and payable - Income Tax Act 1957, ss. 99(1), 102(5)(b), (8)(a) & (b) - Real Property Gains Tax Act 1976, s. 7, Schedule 2*

The applicant sold a certain property and was assessed to tax amounting to RM85,546 in respect of chargeable gains thereof. Dissatisfied with the assessment, the applicant appealed. Subsequently, however, the applicant withdrew the appeal, allegedly upon the advice of the officers of the respondent, and of the Special Commissioners, that the applicant might not have to pay tax under s. 7 of the Real Property Gains Act 1976 ('RPGT') read with items 3(b) and 34 to Schedule 2 thereof, and that the appeal was wanting in not having pleaded these provisions of the law. The appeal having been withdrawn, the Special Commissioners abated the same ('the Order') pursuant to ss. 102(5)(b) and 102(8)(a) & (b) of the Income Tax Act 1967 ('the Act'). The Order made the assessment in question final and conclusive, and that being so the respondent issued a summons against the applicant claiming payment of the assessed tax. The applicant alleged that his withdrawal of the appeal was tainted with inducement and was hence null and void. He further alleged that he had not received a copy of the Order, as well as certain other correspondence that the respondent ought to have sent him. The applicant, in the circumstances, applied to set aside the Order and for a declaration that he be allowed to proceed with the appeal.

Held:

[1] Copies of the letters which the respondent allegedly sent to the applicant were addressed to the last known address of the applicant at No. 22, King Street, 10200 Pulau Pinang. This was the address stated by the applicant in his notice of withdrawal of the appeal. It was also the address averred by him in his affidavits in this application. Hence, there is no reason to

doubt that the respondent had actually posted the letters to the applicant. In the circumstances, it is also appropriate to invoke s. 114(e) of the Evidence Act 1950. Thus, the respondent is presumed to have posted the letters to the applicant and the latter is presumed to have received the same. (p 157 c-f)

[2] Even assuming that the applicant had been 'induced' as alleged, the advice given could not be construed as an inducement. Clearly, if the so-called advice was correct in law, it was to the applicant's own benefit that he should withdraw the appeal. On the other hand, if he felt the advice was incorrect, he ought to have proceeded with the appeal. (pp 157 g-h & 158 a)

[3] The applicant had not explained how s. 7 of the RPGT and the relevant provisions of the 2nd Schedule were supposed to have assisted him. Assuming that the respondent's officers had advised him that these provisions were relevant to his appeal, surely the applicant ought to have ascertained how such provisions would have assisted him before withdrawing the appeal. It is his duty to protect his interest and to be certain of the grounds before electing to withdraw the appeal. (p 159 h)

[4] Once the applicant wrote to the Special Commissioners withdrawing the appeal, there was naturally nothing more to be done because the provisions of s. 102(8)(a) and (b) come into play, so long as the Special Commissioners were satisfied, as was the case here, that the applicant had indeed withdrawn the appeal under s. 102(5)(b) of the Act. (p 160 b-c)

[5] Once the Special Commissioners made the Order, they were for all purposes *functus officio* and there was no need for them to have written the letter dated 13 August 1991 seeking the respondent's reply in respect of the applicant's notice to withdraw his appeal. (p 160 g)

[Application dismissed.]

Legislation referred to:
Evidence Act 1950, s. 114(e)
Income Tax Act 1967, ss. 99(1), 102(5)(b), (8)(a), (b)
Real Property Gains Tax Act 1976, s. 7(3)

For the applicant - M Kanesan; M/s M Kanesan & Assoc
For the respondent - Neng Juliana Ismail DPP

Reported by WA Sharif

JUDGMENT

RK Nathan J:

Facts

On 29 August 1980 the applicant purchased a piece of land known as Lot 569 Section 9W, Bandar Georgetown, Daerah Timur Laut, Pulau Pinang (the said land) for a sum of RM500,000 and on 14 April 1981 he sold the said land to Cariwang Land Sdn. Bhd. (Cariwang) for RM530,000.

Pursuant to the Real Property Gains Tax Act 1976 (the RPGT) the respondent set RM213,865 out of the sale price of RM530,000 as chargeable gains and applying a 40% rate of tax applicable, assessed a sum of RM85,546 as tax payable under the Income Tax Act 1967 (the Act). The respondent then by a notice of assessment dated 20 June 1987 demanded the sum of RM85,546 as tax payable under the Act, for Year of Assessment 1981.

The Applicant's Case

The applicant then filed a notice of appeal dated 5 August 1987 to the Special Commissioners of Income Tax, pursuant to s. 99(1) of the Act. In the said notice of appeal the applicant disclosed that he was a director of Cariwang and had acquired 99.9% interest in its equity capital. The applicant contended that the respondent was wrong to rely on the provisions of para. 9 in Schedule 2 of the RPGT thereby deeming himself (the vendor) and the purchaser (Cariwang) to be connected in relationship and therefore not dealing at arm's length.

The applicant averred that sometime in 1991 he was invited by officers of the respondent and/or officers from the Special Commissioners of Income Tax to a meeting at their Penang office to discuss his appeal. He was then told of a possibility of the tax imposed on him being set aside on the basis of him being exempted pursuant to s. 7 of the RPGT read together with items 3(b) and 34 to Schedule 2 of the RPGT since the said land had been sold to a company in which the applicant is the majority shareholder. On this basis the applicant averred that he was advised by the said officers to withdraw his appeal as he had not pleaded the relevant and applicable provisions in his appeal. He alleged that he was told that the officers would re-assess the tax payable provided he supplied the said officers with the relevant documents relating to the sale of the said land.

Pursuant to the said advice, the applicant, by way of a letter dated 2 August 1991 and addressed to the Chairman, Office of the Special Commissioners, withdrew his appeal.

In the said notice of withdrawal he mentioned that he was withdrawing the appeal as he had not proceeded under the appropriate item 34 to the 2nd Schedule to the RPGT. He also mentioned that the officers of the Tax Department had no objections to his withdrawing his appeal and that they would investigate the matter further. Since there was no further response either from the Special Commissioners or from the Tax Department, he assumed, as a layman, that he had indeed been exempted from paying any tax. However, he was shocked and surprised when in 1999 he was served with a summons filed by the respondent against him in the Sessions Court at Pulau Pinang, claiming a sum of RM94,100.60 being the sum earlier assessed together with an additional 10% penalty being levied for not settling the amount within one month of receiving the notice. He immediately instructed his solicitors to write to the Special Commissioners to enquire as to the outcome of his appeal. He received a reply to which was enclosed a copy of the order of the Special Commissioners dated 9 August 1991. To consider the arguments of the applicant it is necessary to reproduce the entire order which reads as follows:

PESURUHJAYA KHAS CUKAI PENDAPATAN

MALAYSIA

(RAYUAN PKR NO. 516)

ANTARA

IR. CHEW KAM MENG ... PIHAK PERAYU

DAN

KETUA PENGARAH
JABATAN PENGARAH
JABATAN HASIL DALAM NEGERI ... PIHAK RESPONDEN

PERINTAH KEPUTUSAN

RAYUAN ini yang telah ditetapkan untuk Perbicaraan hari ini DAN di atas permohonan Pihak Perayu menarik balik Rayuannya melalui suratnya bertarikh 2hb Ogos 1991 dan yang disalinkan kepada Pihak Responden tanpa kehadiran Pihak Perayu DAN setelah kami berpuas hati bahawa penarikan Rayuan ini adalah menurut Seksyen 102(5)(b) Akta Cukai Pendapatan 1967.

MAKA ADALAH DIPERINTAHKAN bahawa menurut Seksyen 102(8)(a) dan (b) semua presiding di hadapan Pesuruhjaya Khas Cukai Pendapatan hendaklah terhenti dan Notis Taksiran bagi Tahun 1981 yang bersangkutan dengan Rayuan ini hendaklah menjadi terakhir dan muktamad bagi maksud Akta Cukai Pendapatan 1967.

Bertarikh di PULAU PINANG 9hb OGOS 1991.

t.t.
(ABU BAKAR BIN AWANG)
PENGERUSI
PESURUHJAYA KHAS CUKAI PENDAPATAN

t.t.
(DATO' HJ. MOHD. GHAZALI BIN HJ. MOHD. HANAFIAH)
PESURUHJAYA KHAS CUKAI PENDAPATAN

t.t.
(HAJI IDRIS BIN HJ. NOOR)
PESURUHJAYA KHAS CUKAI PENDAPATAN

It is the applicant's case that the order is invalid and ought to be set aside because he withdrew his appeal as he was induced by a promise that his assessment would be reviewed and that there was a possibility that he might not have to pay any tax. He had been under the mistaken belief that the respondent herein and the Special Commissioners were one and the same. He further contended that since his appeal was to be heard on 13 September 1991, the Special Commissioners ought not to have, without his presence, brought the case forward and ought not to have concluded as they did, under s. 102(8)(a) and (b) of the Act.

His other complaint was that a copy of the said order was not sent to him until his solicitor wrote to the Special Commissioners. Alternatively, he pleaded that he be taxed on the excess gain of RM30,000.

The Application

The applicant thus applied for the following reliefs:

1) That leave be given to make the said application.

2) An order declaring the order of the Special Commissioners dated 9 August 1991 as null and void.

3) An order declaring his withdrawal of his appeal to the Special Commissioners by way of his letter dated 2 August 1991 as null and void.

4) An order that the Special Commissioners do proceed to hear his appeal against the assessment made on 20 June 1987.

5) Costs.

Case For The Respondents

By way of an affidavit the respondents denied that there was a meeting with the officers of the Tax Department in 1991 as alleged with respect to the applicant's appeal. The respondents denied that they had intimated to the applicant that the tax imposed on him would be exempted pursuant to s. 7 of the RPGT read together with items 3(b) and 34 to Schedule 2 of the RPGT. The respondents also denied advising the applicant to withdraw his appeal on the basis that he had not pleaded the relevant provisions in his appeal. They further denied that they had promised him that they would review and/or reassess the tax payable provided he supplied the respondents' officers with all relevant documents relating to the sale of the land. In short, all allegations of the applicant had been denied and he had been put to strict proof of the same. The respondents denied any inducement on their part with regard to the applicant withdrawing his appeal. After receiving the applicant's letter withdrawing the appeal the Chairman of the Income Tax Appeal Commission forwarded the said letter to the respondents with a copy to the applicant by way of the chairman's letter dated 13 August 1991. The applicant however denied receiving this letter. The respondents replied to the chairman of the Income Tax Appeal Commission by their letter dated 9 September 1991 whereby they agreed to the withdrawal of the appeal but refused to review the tax assessed since the issue raised earlier had all been dealt with. However, in their final paragraph they intimated that if the applicant intended to raise fresh issues they needed time to review the fresh issues. However, the respondents wrote to the applicant on 17 August 1991 in which letter they said they had been informed by the Special Commissioners that he, the applicant, intended to withdraw his appeal. In their final paragraph they pointed out to the applicant that if he withdrew his appeal then pursuant to s. 102(8)(b) of the Income Tax Act 1967 the assessment made would be deemed as the final amount. Again, the applicant denied receiving this letter. By their letter dated 19 September 1991 the respondents extended to the applicant a copy of their letter dated 9 September 1991 addressed to the Chairman of the Income Tax Appeal Commission. This letter, too, the applicant denied receiving. The respondents also exhibited three other letters dated 26 August 1991, 18 November 1991 and 23 January 1992. The first letter dated 26 August 1991 from the office of the Special Commissioners of Income Tax was in response to the applicant's letter dated 2 August 1991 withdrawing the appeal. The Special Commissioners confirmed allowing the applicant to withdraw his appeal and also sought payment of RM10 in stamps on praecipe for a copy of the order. The respondents also exhibited a copy of the register showing that the notice of assessment dated 20 June 1987 was sent to the applicant by ordinary post on 20 June 1987 to the last known address in their records. The applicant in his affidavit in reply had admitted to receiving this notice of assessment.

Findings Of The Court

(a) Non-receipt Of Letters

The notice of assessment dated 20 June 1987 was addressed to the applicant at No. 10 Jalan Bell, 10350 Pulau Pinang. This is the same address as stated by the applicant in the agreement between himself as the vendor of the said property and one Inmen Sdn. Bhd. as purchaser, which said agreement the applicant had exhibited. However, in his affidavit in support of this application the applicant had averred that he had sold the said land to Cariwang. This discrepancy as to whether the purchaser was Inmen Sdn.Bhd. or Cariwang has not been explained in any affidavit nor in the submission of the applicant.

In any case, I note that all copies of letters which the respondents had said they had sent to the applicant were all addressed to the applicant at No. 22 King Street, 10200 Pulau Pinang. This is the address which the applicant had stated in his notice of withdrawal of his appeal dated 2 August 1991, addressed to the chairman of the Income Tax Appeal Commission. This is the same address that the applicant had also stated in the affidavit in support of this application and in his affidavit-in-reply. There is no reason to doubt that the respondents would have in actual fact posted the letters. If one letter is not received it is possible to assume that it might not have been delivered. But in this case the applicant has said that he had not received each of the letters referred to and the address still remains the same. I am of the view that it is appropriate to invoke s. 114(e) of the Evidence Act 1950 which allows the court to presume that judicial and official acts have been regularly performed. In this case the act of the respondents is an official act. The respondents acting through their officers have extended copies of those letters and addressed them to the applicant's last known address as averred in his affidavits. That last known address is the same as the present address of the applicant. I find, therefore, that the respondents have done their duty by posting the letters and it must be presumed that the applicant must have received these letters.

(b) The Alleged Inducement

The respondents had categorically denied offering any inducement to the applicant to withdraw the appeal. The applicant had averred in his affidavit in support of the application that because of the advice of the respondents that he had not cited the appropriate provisions of the RPGT namely s. 7 and items 3(b) and 34 to the 2nd Schedule to the RPGT he withdrew the appeal and even assuming this to be true, which of course has been denied expressly by the respondents, then this can in no way be construed as an inducement, because if the so-called advice was correct in law, then it was the applicant who would have his appeal dismissed. In other words, if the advice given was correct in

law, it was to his own benefit for him to withdraw the appeal. How could this be construed as an inducement? On the other hand, if he felt the advice as incorrect he ought to have proceeded with the appeal.

In any case, the respondents have denied any impropriety and I cannot find any reason why the respondents would deliberately deprive the applicant of his right to appeal.

(c) The Relevant Applicable Provisions

(i) The RPGT

To consider this issue raised by the applicant it is necessary to reproduce the relevant applicable provisions of the RPGT. Section 7 of the RPGT reads as follows:

> (1) Where a chargeable asset is disposed of, then:
>
> (a) if the disposal price exceeds the acquisition price, there is a chargeable gain;
>
> (b) if the disposal price is less than the acquisition price, there is an allowable loss; and
>
> (c) if the disposal price is equal to the acquisition price, there is neither a chargeable gain nor an allowable loss.
>
> (2) –
>
> (3) Subsection (1) shall be subject in its operation to Schedule 2, which shall have effect for computing acquisition and disposal prices and otherwise as provided therein.

Schedule 2 which is referred to in sub-s. 7(3) relates to the computation of chargeable gains and allowable losses.

> Item 3: In the following cases the disposal price shall be deemed to be equal to the acquisition price, that is to say:
>
> (a) –
>
> (b) the transfer of assets between spouses or the transfer of assets owned by an individual, by his wife or by an individual jointly with his wife or with a connected person to a company (whether or not resident in Malaysia) controlled by the individual, by his wife or by the individual jointly with his wife or with a connected person for a consideration consisting of shares in the company, or for a consideration consisting substantially of shares in the company and the balance of a money payment;

Item 34. (1) Where an asset is transferred to a company under paragraph 3(b) for a consideration consisting of shares in the company, or for a consideration consisting substantially of shares in the company and the balance of a money payment, the acquisition price paid for the asset by the transferor, plus the permitted expenses incurred by him and minus the amount of any money payment or, if the asset was acquired by the tranferor prior to 1st January, 1970, the market value of the asset as at 1st January, 1970 plus the permitted expenses incurred by the transferor as from 1st January, 1970 less the sum of the kind referred to in paragraph 4(1)(a), (b) or (c) received by or forfeited as the case may be to the transferor as from 1st January, 1970 and minus the amount of any money payment, shall be taken as the acquisition price of the shares:

Provided that, where the money payment exceeds the acquisition price paid for the asset by the transferor plus the permitted expenses incurred by him or, if the asset was acquired by the transferor prior to 1st January, 1970, the market value of the asset as at 1st January, 1970 less the sum of the kind referred to in paragraph 4(1)(a), (b) or (c) received by or forfeited as the case may be to the transferor as from 1st January, 1970, the acquisition price of the shares shall be deemed to be nil and, if the payment was made on or after the date of coming into force of this Act, the excess shall constitute a chargeable gain accruing to the transferor.

(ii) The Income Tax Act 1967

Subsection (5)(b) and s. (8) of s. 102 on disposal of appeals read thus:

(5) Where an appeal has been sent forward to the Special Commissioners pursuant to this section:

(a) –

(b) the appellant may at any time withdraw the appeal.

(8) Where the Special Commissioners are satisfied that the appellant has withdrawn his appeal under subsection (5)(b):

(a) the proceedings before the Special Commissioners relating to the appeal shall abate; and

(b) the assessment to which the appeal relates shall be final and conclusive for the purposes of this Act, the Income Tax Ordinance, 1956, of Sabah, the Inland Revenue Ordinance, 1960, of Sarawak or the Income Tax Ordinance, 1947, of West Malaysia, as the case may be.

In considering these provisions, the applicant had not explained how s. 7 of the RGPT and the relevant provisions of the 2nd Schedule were supposed to have assisted him. Assuming the officers of the respondent had advised him

that the above cited provisions were relevant to his appeal, surely the applicant ought to have ascertained how such provisions would have assisted him before he withdrew the appeal. It would have been the duty of the applicant to have protected his interest and to be certain of his grounds before he elected to withdraw his appeal. Even in his submission the applicant failed to address the court on this very vital issue.

Once the applicant wrote on 2 August 1991 to the Special Commissioners withdrawing his appeal naturally there was nothing more to be done because then the provisions of s. 102(8)(a) and (b) of the Act would automatically come into play, so long as the Special Commissioners were satisfied that the applicant had indeed withdrawn his appeal under s. 102(5)(b) of the Act. In this case, having received the applicant's letter withdrawing his appeal and being satisfied that everything was in order the office of the Special Commissioners of Income Tax took it upon themselves to bring forward the hearing of the appeal by way of disposal from 13 September 1991 to 9 August 1991 and made the necessary order.

The applicant made an issue of the fact that he was not even notified of the disposal date. For that matter neither was the respondent notified of the said date. Since there is no question of costs being awarded to the respondent, the Special Commisioners ought to be commended for disposing of the matter, a month earlier.

However by way of a seemingly bureaucratic mishandling of this case, with the right hand not knowing what the left hand had done, the office of the Special Commissioners of Income Tax, having made the order to dispose of the appeal on 9 August 1991, sent a letter on 13 August 1991 to the respondents enclosing the applicant's notice of withdrawal of appeal and seeking the respondent's reply at the earliest. The respondents also took 26 days to reply by way of their letter dated 9 September 1991, the contents of which I have already narrated earlier. The applicant also took umbrage on this issue. To my mind once the Special Commissioners had made an order, they were for all purposes *functus officio* and there was no need for them to have even written the letter dated 13 August 1991 to the respondents which was even copied to the applicant.

Having considered all the issues raised I dismissed the application with costs